STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 10, 2009
v	No. 286268 Oakland Circuit Court
MARZELL PITTMAN, Defendant-Appellant.	LC No. 2008-218973-FH

Before: M. J. Kelly, P.J., and K. F. Kelly and Shapiro, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), and larceny less than $200, MCL 750.356(5). We affirm.[1]

I. Basic Facts

Police officer Ryan Roberts testified that while patrolling at 5:30 a.m. on August 27, 2007, he saw two men carrying a generator and a weed whip. Roberts and his partner backed up to investigate. They observed one of the men, co-defendant David Clay, jogging down the street; the other man had disappeared. When Clay was apprehended, defendant came out of hiding from behind a nearby house. Defendant denied stealing any of the items and claimed that he had purchased them from Clay for $75. However, Clay did not have any money on him at the time of his arrest. Clay stated that he had obtained the items from a burned-out home nearby. Roberts followed what appeared to be wheel tracks from the generator to the home of complainant, who told Roberts that two generators, a weed whip, and an edger had been taken from his porch. The officers went to defendant's house in the same neighborhood and found a second generator and a lawn edger. A person at the house told police that the equipment did not belong there. The officers took the equipment back to complainant, who identified the items as belonging to him.

II. Fair Trial

On appeal, defendant first argues that he was denied a fair trial by the trial court's failure to instruct the jury on the alternate offense of receiving or concealing stolen goods, because this

[1] This appeal has been decided without oral argument pursuant to MCR 7.214(E).

failure denied defendant his right to have the jury instructed regarding his theory of the case. We disagree because a review of the record reveals that there was no plain error. Defense counsel stated that he had no objection to the jury instructions given by the trial court. Counsel's statement acted as a waiver by defendant, see *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002), and extinguished any claim of error with respect to the propriety of the instructions. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). "Because defendant waived . . . his rights . . . there is no 'error' to review," *id*. at 219, and it cannot be said that defendant was denied a fair trial.

III. Ineffective Assistance of Counsel

Defendant also asserts that his counsel was ineffective for failing to request the instruction for receiving or concealing stolen goods. Again, we disagree. "Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id*. "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id*. at 663-664. Because no *Ginther*[2] hearing was held, our review of defendant's claim is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Here, it appears that counsel deliberately chose to not ask for a lesser offense instruction in order to force an "all or nothing" decision from the jury in light of the prosecution's less than overwhelming evidence that defendant was directly involved in the theft. During trial, defendant's counsel argued to the jury more than once that defendant might have been guilty of receiving stolen property, but stated that "we're not here about receiving stolen property." Given these statements, it is clear that counsel was well aware of that distinct offense and was making a point to distinguish it from the charged offenses. Counsel's apparent strategy was to provide a basis for the jury to find defendant not guilty of the charged offenses, but to not provide the jury an opportunity to find defendant guilty of the uncharged offense. That this "all-or-nothing" strategy did not work does not render its use ineffective assistance. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

In addition, we note that even if counsel had requested the instruction, the trial court likely would not have provided it in light of the fact that the prosecution did not charge defendant with this lesser offense. Upon request, a trial court must instruct a jury on a necessarily included lesser offense as an alternative to the greater offence, if such an instruction comports with a rational view of the evidence. *People v Cornell*, 466 Mich 335, 357-359; 646 NW2d 127 (2002). However, an instruction on a cognate lesser included offense is not permitted. *Id*. at 359. Receiving or concealing stolen property is a cognate lesser included offense of home invasion. See *People v Kamin*, 405 Mich 482, 496; 275 NW2d 777 (1979);

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

MCL 750.110a(2); MCL 750.535. Thus, even if counsel had requested the instruction, such an instruction would have been inappropriate. Defendant has not shown that he was provided ineffective assistance of counsel.

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro